

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

BETTER COMFORT SYSTEMS, INC.

And

**Case Nos. 1-CA-41409
1-CA-41694**

**SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION, LOCAL 17, AFL-CIO**

Thomas Morrison, Esq., Counsel for the General Counsel.
Kevin Keating, Esq., Counsel for the Respondent.

DECISION

Statement of the Case

Joel P. Biblowitz, Administrative Law Judge: This case was heard by me on June 6, 7 and 8, 2005 in Boston, Massachusetts. The Consolidated Complaint herein, which issued on March 16, 2005, was based upon unfair labor practice charges and amended charges that were filed on November 26, 2003¹, February 18, 2004, and April 9, 2004 by Sheet Metal Workers International Association, Local 17, AFL-CIO, herein called the Union. The Complaint alleges that Better Comfort Systems, Inc., herein called the Respondent, on November 21, told Union applicants that it would not hire Union members, and refused to hire, and refused to consider for hire, ten individuals who applied for employment with the Respondent on May 16 and November 21 because of their membership in, or support for, the Union. The Complaint further alleges that since about November 4 the Respondent began subcontracting its sheet metal work to other employers to avoid hiring Union applicants, all in violation of Section 8(a)(1)&(3) of the Act.²

Findings of Fact

I. Jurisdiction

The Respondent, whose office and place of business is located in Malden, Massachusetts, herein called the facility, is engaged in providing heating and air conditioning installation and service. There are two aspects of its operation. The servicing of heating and air conditioning equipment has historically been its principal source of business and in 2003 accounted for about 60% of its total business. The other 40% is the installation or renovation of heating and air conditioning equipment, which is usually obtained through a bidding process. One aspect of the business that the Respondent does not, itself, perform is the manufacture and fabrication of ductwork, although they do install the ductwork. Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

¹ Unless indicated otherwise, all dates referred to herein relate to the year 2003.

² Respondent's Motion for a New Hearing, dated July 31, 2005, is without merit and is denied. *Liteky v. U.S.*, 510 U.S. 540 (1994).

II. Labor Organization Status

Respondent admits, and I find, that the Union has been a labor organization within the
5 meaning of Section 2(5) of the Act.

A. May 16 Applications

On about May 16, seven Union “salts,” Edward Marenburg, Robert Eva, John Ross, and
10 Tony Dalphonso, Union organizers, and Tom Saccardo, Monica Brown and Kevin Campbell, Union members, went to the Respondent’s facility where they handed in applications for employment. Marenburg testified that they arrived at the facility at about 10 a.m. He was wearing a Union jacket and hat and all of the others were wearing something with the Union emblem. Outside of the facility was a sign with Respondent’s name, stating:

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HELP WANTED
A Great Place to Work...Check Us Out
HVAC TECH
SHEET METAL TECH

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He testified that all seven applicants walked in together and were approached by a woman, and he told her, “I see that you’re looking for sheet metal workers. We’ve got competent qualified people that would love to work for you.” She gave all of them applications and pens and led them to a lunchroom in the basement where they could fill out the applications. The woman left
25 the area and a gentleman walked into the area. Marenburg introduced himself as a Union member and asked if he was the owner. He responded: “No, the president, Jim Schiavone.”³ Marenburg told him that they were qualified competent sheet metal workers and that they would like to work for him. When Marenburg asked if he was going to interview them, he did not respond. When Marenburg asked if he would be in touch with them to interview them, he said
30 yes. All seven handed in their applications and left the facility. Marenburg testified that about a week later, as he had not heard from the Respondent about his application for employment, he called the Respondent’s facility, and when he heard the message he pressed the number for James’ extension. When he answered the phone, Marenburg identified himself and asked if he had an opportunity to look at his application because he was eager to work for him, and he
35 responded that he was still reviewing the applications. Within the next three weeks, he called James twice, and each time left a message on his answering machine, but James never returned the calls and he was never offered a job by the Respondent. Marenburg testified that if he were offered a job by the Respondent, he would have accepted the job.

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Ross testified that all seven applicants went to the Respondent’s facility at the same time. He was wearing a Union shirt and hat; all the others were wearing some Union insignia. Before going in, he saw the Help Wanted sign hanging outside the building. When they walked in, they identified themselves to a woman as qualified sheet metal workers applying for jobs.

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³ James P. Schiavone, herein called Schiavone, is Respondent’s President. James M. Schiavone, his son, herein called James, is the sheet metal department supervisor/construction operations coordinator for Respondent. Both are admitted supervisors and agents of the Respondent within the meaning of Section 2(11) and 2(13) of the Act, as are Mark Montalato, Service Department Supervisor, Len Lytle, General Manager, and Dennis Leary, Project
50 Manager. The evidence establishes that on this occasion, and on November 21, the individual that the Union applicants met with was James.

She handed each of them an application and took them downstairs to fill out the applications. Shortly thereafter, an individual came downstairs, introduced himself to Marenburg as Jim Schiavone, and he had a quick conversation with Marenburg, which Ross did not hear, as he was filling out his employment application. After the individuals completed filling out the applications, they went upstairs and handed in the applications to either James or the secretary. Ross asked James how long the applications were good for, and he responded, "They're good." Ross asked if there was a time limit on it, and James responded, "No, they're good. I'm going to call you. Don't worry about it."⁴ After that, Ross and the other applicants left the facility. Not having heard from the Respondent, Ross called the facility about a week to ten days later and left a message, saying: "Mr. Schiavone, this is John Ross. I put in an application. I'm waiting to hear from you. I'm still interested in the job and please contact me and let me know what the status of my application is." The Respondent never returned his call, and he was never offered employment by the Respondent. If he had been offered a job, he would have accepted it.

Brown testified that she went to the Respondent's facility on May 16 with the other six individuals. When they arrived, a secretary was sitting at a desk near the entrance, and Ross told her that they were sheet metal workers and would like to fill out applications. She directed them to go downstairs and then somebody gave them applications and pens. He identified himself, but Brown could not remember his name. She asked him how long the applications would be good for, but she could not recollect whether he said ninety days or one year. After they completed the applications, they waited for somebody to come back downstairs to take the applications. When nobody did, they went upstairs and gave them to the secretary, and she said that somebody would get in touch with them, and they left. She waited about two weeks before calling the Respondent's facility. At that time she called and left a message, identifying herself, and asked if anyone had a chance to review her application, and if she could have an interview. She never received a call back. If she had been offered a job by the Respondent, she would have accepted it.

James testified that in May, six or seven individuals, including Marenburg and one woman came to the facility to apply for jobs, although he does not remember that they were wearing any form of Union insignias. When he first saw them, they were completing the employment applications in the cafeteria of the facility. He told them that if he "...needed to hire anybody that we would give them a call." That was the extent of his conversation with the applicants on that day. At the time, Respondent employed about nine sheet metal employees, but had no openings for any others.

Marenburg's application lists two prior periods of employment in the field, one as a sheet metal mechanic from 1985 to 1990, installing and fabricating, with a salary at the "collective bargaining rate," and employment with another employer from 1990 to 2002 as a "foreman-running jobs." The salary is listed as "collective bargaining rate" and the reason for leaving is stated as: "To take organizer position." His present job is listed as organizer with the Union and the reason for leaving is stated as: "To organize Better Comfort Systems." He testified that his work experience was: "Everything pertaining to make the job work. I ran the manpower, I ordered, I measured, I drew...a blueprint drawing. Everything required to get the job done. All facets of sheet metal."

Ross' employment application lists employment as a sheet metal foreman from 1986 to

⁴ The final line of the Employment Application, under the applicant's signature, states: "This application for employment will remain active for a limited time. Ask the organization representative for details."

1990 at \$29 to \$30 an hour, employment with the Union as an organizer from 1990 to 2001, and employment as a sheet metal worker from October 2001 to June 2002 at a “collective bargaining” wage of \$30 an hour. It also lists his employment with the Union as Director of Labor Management Trust from June 2002 to May 2003. He also participated in the Union’s apprenticeship program. Brown lists prior employment as a “Sheet metal worker/ hang duct, fire proof, bang duct” from 1997 to 1999 at the collective bargaining rate, and employment as a “Sheet metal worker/ shop banging fitting, unload trucks, hang duct” from 1999 to 2003 with the wage at the collective bargaining rate. She completed the Union’s five year apprenticeship training program in 2000. Eva’s application lists his present employment as an organizer for the Union. The application lists his skills, and states that he spent four years as a sheet metal apprentice with the Union and lists three employers where he performed sheet metal work from January 2000 to January 2001, April 2001 to September 2001, and January 2002 to August 2002, all at the collective bargaining rate and all of which he left due to the lack of work. Saccardo’s application lists three prior employers as a sheet metal mechanic all at the collective bargaining rate. The first lists no dates of employment, while the other two state only that they were from 2001 to 2002 and 2002 to 2003. Campbell’s application lists four prior employers where he was employed as a mechanic or a journeyman. The employment periods listed are 1991 to 1995, 1995 to 1997, January 1999 to May 1999, and June 2000 to January 2003, the last two of which were at the collective bargaining rate. Dalphonso’s application lists his employment from 2001 to the present as organizer for the Union. Prior to that he was employed as a sheet metal worker from 1987 to 2001 at the collective bargaining rate. He also attended the Union’s apprenticeship school. The seven applicants, in response to the question, what is the desired salary range, responded negotiable or anything fair.

Schiavone testified that the HELP WANTED sign that was outside the Respondent’s facility on May 16 had been there for ten to twelve years. He testified that the purpose of the sign is to attract “...a special outstanding caliber sheet metal technician or an outstanding caliber HVAC technician.” He was then asked:

Q Okay. But the candidate that you have just described, if he walked through your door and filled out an application would you hire him?

A If he was a person that we knew of outstanding caliber, we would hire him.

A And...

Q Excuse me. If he was a sheet metal person that I don’t know, we’re not hiring.

James testified that the purpose of the HELP WANTED sign is, “To get prospective employees to come in and apply for...jobs,” but that doesn’t mean that there is a job available while the sign is there. His testimony continued:

Q So, does a job always have to be available when an applicant walks in the door for you to hire the applicant?

A Yes.

Q Okay. Then why do you always have the sign outside?

A Applications.

Q But you simply get applications if there are no jobs available to collect them?

A It's a very cyclical industry, so there's always a need for employees at some point. So, if we have it on file and something comes up within a certain time frame, then we have that employee that we can call.

Schiavone testified that because of the high demand for qualified sheet metal workers in the area:

we feel that if you apply for a job today in a trade that's looking for workers, that if you haven't got a job three or four weeks after you've applied with us, you're not worth working with us so we won't hire you. We don't look back in old records because if you don't have a job today and if you don't have a job three weeks from now, you won't be having a job six weeks later or 75 days later because you just don't want to work.⁵

B. Wayne Hess' Employment With Respondent

Wayne Hess, a Union member since 2000, completed the Union's apprenticeship program in April 2005. He participated in the Union's Youth to Youth Program, which basically operates as part of the Union's salting program. He testified, however, that he obtained a job with the Respondent not through the Youth to Youth Program, but because he saw the Help Wanted sign outside the Respondent's facility. He went to the Respondent's facility on March 13, told a woman that he saw the sign out front, and would like to apply for a job. She brought him to speak to James, who asked him about his skills in the industry. When Hess told him of his experience, James asked him if he could be in charge of other employees, and Hess told him that he could supervise two or three employees at a time. James asked him if he could weld, and he said that he could, and James said that was just what the Respondent was looking for, and gave him an employment application to complete. On the employment application, the first employer Hess listed in a chronological manner was Shaw's Supermarket, where he was employed as a grocery clerk; no dates or salary is listed. He next worked as a parts clerk at an auto dealer from 1993 to 1994 at \$6.50 an hour, followed by employment as a automobile mechanic from 1995 to 1998 at \$8.00 an hour, and employment with an HVAC company from 1998 to the present as a lead man/installer at from \$12.00 to \$18.00 an hour. There is no mention of the Union or its apprentice program on his application. James then called in the Respondent's project manager, presumably Dennis Leary, who spoke to Hess for about ten to fifteen minutes. They asked Hess when he could start working for the company and he said immediately. Hess' application asked for \$18 to \$22 an hour as the requested salary, and James said that they didn't normally give that as a starting salary, and they offered him \$15 an hour and he accepted. He told Hess to buy safety boots and he began working for the Respondent about a week later. Up to that time, he never told James, or any other representative of the Respondent, that he was a member of the Union.

His first job with the Respondent was as a foreman over two other employees. He measured the job and sketched it, while the other employees ripped out the old ventilation

⁵ However, Respondent's summary of employees states the following: Sheet Metal Lead David Nye completed his application for employment on July 5, 2001 and was hired on November 12, 2001. Lead foreman Bill Boyce completed his application on December 5, 2002 and was hired on April 28, 2003. Service Technician Alan Miller completed his application on April 20 and was hired on June 2. Service Journeyman Keith Starosciak completed his application on March 27 and was hired on June 9. And Service Journeyman Joshua Harrell completed his application in April 2004 and was hired on June 28, 2004.

system. That job lasted the entire period of his employment with the Respondent, but he also supervised two other jobs for the Respondent, each with, up to, two other employees. He testified that, while working, he spoke to the other employees on a “minimal” basis about the Union, and that it was not until his final day of employment with the Respondent⁶ when he called James over the Respondent’s radio from the job site and told him that he was a Union member. He told James that he knew that he liked his skills, and that he could obtain more employees like him if he called Ross and met with him. James told him that he didn’t want to have anything to do with the Union, that he was too small for the Union and he stayed away from Union jobs. That afternoon, Hess went to the Respondent’s facility to return the Respondent’s equipment, and he met with James, who again praised his work. Hess again told him that he should call the Union because they have lots of members who are better workers than he, but James said that he didn’t want anything to do with the Union.

On March 20, James completed an Applicant Appraisal Form for Hess, recommending him for hire for the reason that: “Experience, attitude, ability to perform necessary tasks relative to position.” Respondent’s employment records establish that Hess asked that his present employer not be called for a reference in case he did not get hired by the Respondent, and the Respondent went along with that request. The record also states that his hire date was March 31 at an hourly wage of \$16.00. James testified that in May, Hess called him over the radio to say that he was quitting because “his employer,” who he identified as Ross, told him that he could no longer continue working for the Respondent. Schiavone testified that there was no need to hire anybody to replace Hess because about a week earlier, Bill Boyce, one of Respondent’s foremen, told him that he had “..two guys we could get for dirt money and they want to work.” They were Wilson Ferreira and Marcelo Dos Santos, laborers without any sheet metal experience, but they were “great workers.” Because of these two individuals, they “...weren’t looking for anybody else.” He testified: “So, when Wayne had left we already had two people to replace him.” Respondent’s records state that Dos Santos and Ferreira applied to work for the Respondent on April 24 and April 25, and both started working for the Respondent on April 29, although their wage rate is not given. Dos Santos’ final day of employment with the Respondent was June 22. Schiavone testified that Ferreira left Respondent’s employ and found another job, without giving a date of his departure. On one of Respondent’s employment summaries, no date is given for Ferreira’s final day of employment with the Respondent. On another summary, July 14, 2004 is listed as his final day.

C. Radio and Newspaper Advertisements

Marenburg testified that in November Hess told him that he heard an advertisement on Boston radio station WEEI stating that the Respondent was looking for sheet metal employees. Marenburg then turned on the station and heard the advertisement as well. John Karpinski is employed by WEEI as a retail sales manager. He testified that in about early October, the radio station received a call from the Respondent and the sales manager referred the account to him. He called the Respondent’s facility and arranged to go to the facility in mid-October. At that time, the individual he met, apparently Lytle, told him that they needed HVAC technicians and they thought that the station would be a good place to advertise because it targets men. They had used newspaper advertising in the past and wanted to try something different. In addition, they needed people immediately and wanted to employ “the immediacy of radio.” Shortly thereafter, the Respondent faxed to Karpinski the wording of prior print advertisements for sheet

⁶ Although Hess could not recollect the date that he left the Respondent’s employ, the Daily Salt Log that he maintained and transmitted to the Union states that his final day of employment with the Respondent was May 6.

metal technicians to assist him in preparing the radio text. The sales order for the advertisements was completed on about November 7 and the ads began running on November 11; this sales order lists General Manager Len Lytle as Respondent's contact, although Karpinski testified that Lytle asked him not to put his name in the ads. The station broadcast thirty six ads for "Recruitment" for the Respondent, each of fifteen or thirty second duration, from November 11 through November 25, at \$200 or \$300 for each ad, for a total of \$9,600, which amount was paid by the Respondent between January 23 and February 12, 2004. The Respondent paid a premium for these ads in order to obtain a "priority code" from the station. This meant that if the station oversold ads, the ads with the priority code would not get bumped from the broadcast.

Schiavone testified that in about August, he was fairly certain that they would be awarded a contract to perform the HVAC work on the Digital Federal Credit Union job, herein called the Digital job, which will be discussed more fully below. This was the largest project that the Respondent would ever have performed, and that was why they contracted to advertise for new employees with WEEI. In early November he was negotiating with American Ventilation, herein American, for American to be their subcontractor on one portion of the Digital job, but that contract had not been finalized within the 14 day cancellation period provided by WEEI, so they ran the WEEI ads, but obtained no new employees or employment applications from these ads.

In addition to the recruitment advertisements on WEEI, the Respondent advertised for sheet metal workers in the Malden Evening News on September 3, and in the Metro West Daily from August 29 through September 11 and from October 10 through October 23, at a cost of about \$1,500. In addition, on March 20, the Respondent entered into a Schedule to Membership Agreement with HVAC Agent, an on-line employment agency, which provided that HVAC Agent would provide the Respondent with all resumes from their database that met their requirements for sheet metal workers and technicians. Marenburg contacted HVAC Agent and received an e-mail from them dated December 1, stating: "We just wanted to let you know that your information has been forwarded to Better Comfort Systems, Inc. for a possible job opportunity..."

D. November 21 Applications

Marenburg returned to the Respondent's facility on November 21 after hearing the Respondent's ads on WEEI. He testified that on November 19 he called James, identified himself, and asked him if he was looking for manpower. He said that was what the Union was all about, training competent individuals. James responded that he wasn't interested and he wasn't big enough to be a union employer. On the following day Marenburg called James again, although on this occasion he did not identify himself. He said that he was a sheet metal worker looking for a change of pace. James asked him about his qualifications, and Marenburg said that he had run several jobs and knew what he was doing, and would love the opportunity to come in and apply for a job. James asked how much he was making and he said he was making \$25 an hour and James said that he could start him at \$20 until a review. Marenburg asked if he could come in the next day and James said that he could. On the following day, Marenburg arrived at the Respondent's facility at about 10 a.m. with Union members Todd Fisher and Joseph Dever and Union business agent Fred Creager. The HELP WANTED sign that was there on May 16 was still in front of the facility. When they walked in nobody was there until Marenburg yelled "hello" and James came out. Marenburg said, "Hi, Jim, Ed Marenburg. I hear you had an ad on the radio. We're competent sheet metal workers. Like to go to work for you." James responded, "I'm not hiring you people." Creager responded, "That would be discrimination" and James said that they could fill out applications, but he wouldn't hire them.

They filled out the employment applications and left the Respondent's facility. About a week later he called James and left a message which was not returned. About a week after that call, he called James again and said that he saw that he was looking for help through HVAC Agent, and that he had applied there. He asked if James had an opportunity to look over his application, and James said that "Mark" (presumably Mark Montalato, Service Department Supervisor) handled the HVAC Agent applications. Marenburg asked if he would be contacting him and James said yes, and that was the extent of the conversation. He was never offered a job with the Respondent and, as was true of his earlier application, if offered a job, he would have accepted.

Fisher testified that on November 21 he went to the Respondent's facility looking for a job; he had been out of work for about six months at the time. Together with the other applicants, he handed in an employment application to the Respondent that day. On the following day he called the Respondent and spoke to a secretary and asked her who did the hiring for the company and she said "Jim," but he wasn't there at that time. Fisher asked her to connect him to his voicemail and he left a message saying that he had put in an application the prior day, and he was looking for a job and would appreciate it if he would call him as soon as possible. As he had not received a call back, he called again two days later and asked to speak to Jim. When he answered, Fisher identified himself and said that he had filled out an employment application a few days earlier and wanted to know where he stood. Jim said, "wait a minute, let me get your application" and returned about a minute later and said, "Oh, you're one of those guys, we're not hiring," and "Jim" hung up. A few days later he called again, and "Jim" told him that he was "not playing games" and hung up on him. A few days later he called again and asked the secretary if anybody other than "Jim" does hiring, and she said no.⁷

Dever testified that he went to the Respondent's facility on November 21 with Marenburg, Fisher and Creager. When they arrived at the facility at about 10 a.m. he saw the HELP WANTED sign out front of the facility. He and Fisher were wearing shirts with the Union insignia, and Marenburg and Creager were wearing Union hats. They had previously filled out the employment applications and when they walked in a gentleman came over to them and spoke to Marenburg. Marenburg told him that he knew that they needed help and that he had two qualified young men for him. Dever and Fisher told James of their qualifications and James responded that he would take their applications. Marenburg asked if he was looking for workers, and James responded that he was, but he said: "I'm not looking for you guys." Marenburg asked: "By 'us' do you mean Local 17 members" and James said yes. Marenburg told him that he was discriminating against Union members, and James said that he would take their applications, and the four of them gave him their employment applications. About a week later Dever called the Respondent, spoke to a woman and told her that he had put in an application the prior week and was calling to see if anything was done with it. She took his name and telephone number, but nobody called him back. Dever testified that Respondent never offered him a job, but if he were offered a job by the Respondent he would have accepted it.

Creager testified that the four went together to the Respondent's facility on November 21. He was wearing a jacket with the Union insignia and observed the HELP WANTED sign outside. After they walked into the facility a gentleman came out and asked if he could help them. He and Marenburg said that they were there to apply for jobs, and the gentleman responded, "I don't need to hire any of you guys." Marenburg said that they were qualified sheet metal workers and he said, "I don't need to hire any Union guys." Creager then said that he was

⁷ Fisher's two conversations with the secretary were objected to as hearsay and were not admitted for the truth of what she said.

discriminating against them, and he responded that he would take their applications. They told him of their qualifications and he responded that he would look over their applications and they left. Creager testified that after they left, Marenburg told him that the individual they were speaking to was James. Not having heard from the Respondent, Creager called and spoke to a gentleman whom he believes was James. Creager identified himself, said that he had handed in an application a few days earlier, and wanted to know if they were hiring. He responded that he was still looking at the applications. Creager called on two other occasions and left messages that he was waiting to hear if they were hiring; these calls were not returned. If offered a job, he would have accepted. James testified that in November Marenburg came to the facility with three other applicants.

Each of the employment applications handed in on November 21 states that the applicant heard about the Respondent from the ads on the radio, that they could start working for the company immediately, and that the salary range requested was: "Anything fair." Marenburg's application is similar to the one he handed in May⁸ and again states that he is presently employed as an organizer for the Union. Creager's application lists his present employment as business agent for the Union since 1999, and employment with two named companies as a sheet metal worker from 1979 to 1990 and 1990 to 1999. It also states that he completed four years of the Union's apprentice program. He testified that he has experience in shop work, fabricating sheet metal and as a foreman. Dever's application lists four prior employers from November 1997 through November 2003 where he was employed as a sheet metal worker and as a sheet metal mechanic installing ducts. He testified that he completed the Union's apprenticeship program. Fisher's application, which is not signed, lists four employers where he was employed as a sheet metal mechanic, all at the "collective bargaining wage." Chronologically, the first is listed as lasting from January 1989 to February 1989. The next one has no dates. The following one lists January 1 to May 25, but without a year, and the final one lists no dates of employment. He testified that for the first three, he could not remember the exact dates. For the last employer, he did not list the dates because over a five year period from about 1995 to 2000 he worked on and off for this company on about ten occasions. He testified that he completed the Union's five year apprenticeship program.

Counsel for the General Counsel questioned James as a Section 611(c) witness regarding the applicants' qualifications for employment with the Respondent. James testified that based upon the contents of their employment applications, Marenburg, Ross, Eva, Creager, Dalphonso, Campbell and Brown were qualified for consideration for employment with, and to be hired by, the Respondent for sheet metal employment. As for Fisher, James testified that he was qualified for consideration for employment by the Respondent, but because of the absence of some employment dates on his application, he cannot tell whether Fisher was qualified to be

⁸ There are discrepancies between Marenburg's two employment applications with the Respondent involving the dates of his employment prior to becoming Union organizer in June 2002. In the May employment application, he listed the term of his employment with Hamilton Sheet Metal as from August 1985 to September 1990, and his employment with New England Ventilation from September 1990 to June 2002, while in the November employment application, he lists these two employment periods as August 1986 to February 1992 and February 1992 to July 2002. In addition, in the November employment application, he lists employment as a sheet metal worker from August 1984 to August 1986 at the collective bargaining rate, which was not listed in the May application. Counsel for the Respondent, after showing James these employment applications, asked him whether he would hire an applicant who had conflicting employment dates on different applications, and he testified that he would not hire such an applicant.

hired by the Respondent. Counsel for General Counsel then asked James whether this was the typed of information that he would obtain from an applicant when he was called for an interview, and James testified that because Fisher did not list this information on his application, “I probably would never have brought him in.” As for Dever, he testified that he is qualified for consideration for a sheet metal position with the Respondent, but he would probably not hire him because of the large number of times that he was laid off, although, based upon his qualifications, training and experience, he is qualified to be hired for a sheet metal position with the Respondent. As regards applicant Saccardo, James testified that he was qualified for consideration for employment with the Respondent, but that he was not qualified for hire by the Respondent because of a lack of experience in sheet metal work.

E. The Digital Job

The general contractor on the job was Rosewood Construction Corp., herein called Rosewood, and the work involved improvements to the Digital building in Marlborough, Massachusetts. There were two distinct aspects of this job that the Respondent successfully bid for: Contract #4250, in the amount of \$740,000, involved purchasing, delivering and installing the air conditioning and heating equipment on the roof of the building and the duct work that traversed from the roof through the core of the building to provide the heating and air conditioning for the building. Contract #4343, in the amount of \$822,000, involved the distribution of the duct systems from the main trunk line (#4250) throughout the building to the various offices, together with the thermostats that control the heating and air conditioning. Respondent’s bid proposal for the job was sent in about August. Schiavone testified that these subcontracts were probably the single largest contract that the Respondent had ever received. He testified further, that in about August the company was “fairly well sure that we were going to be awarded this project” based upon the work the Respondent had previously performed for Rosewood and the favorable remarks that they had received about the work. Because these two contracts together totaled about \$1.6 million and involved a lot of equipment as well as a massive amount of labor, talent and raw materials, at that time, they began looking to subcontract the work under #4343.⁹ He testified in about October the Respondent employed seven or eight sheet metal workers and that the purpose of the advertisements on WEEI, as discussed above, was to gain new employees to handle the Digital job, but the ads resulted in no employees and no applications. As to why they placed in ads with WEEI beginning on November 11 when the Respondent had entered into the subcontract with American Ventilation, herein called American, at about this time, he testified that WEEI has a two week cancellation policy, and it was too late to cancel at that time.

Schiavone testified that on about November 4 he had discussions with William Levasseur, the owner of American, about their performing the duct and sheet metal work referred to in Contract #4343. On November 21, the Respondent faxed a purchase order to American for the performance of the sheet metal work for Digital Contract #4343. This authorized American to purchase materials and perform the work on that contract. The stated price for the work was \$235,000. Schiavone identified a Job Estimate Summary prepared by the Respondent for Contract #4343, setting forth the costs and anticipated profits of this contract.¹⁰ This Summary states that the projected net profit from this contract was \$105,000. After this job was completed by American, the Respondent’s actual net profit on this contract was \$170,000.

⁹ Schiavone testified that he cannot recall whether the Respondent had previously subcontracted sheet metal work.

¹⁰ This Summary contains two dates, June 2 and October 3. It is not clear from the records on which of these dates this summary was prepared.

In addition to making a larger profit than if his employees had performed the work, Schiavone testified that Respondent could not have performed the work under Contract #4343 because: “We just didn’t have the manpower.” He testified:

5 A The project required a lot of employees to man the project to hang sheet metal and provide the tooling and materials we would have needed to do that project in a timely fashion. There was a time frame that the project had to be put in under and while we could have done it over a three year period we certainly couldn’t do it under the time frame that we had.

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Q And what was the time frame?

A It had to be completed by I believe sometime in October or November [2004].

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On November 4, Respondent faxed American a “transmittal,” containing the mechanical drawings of the Digital job, stating, “Please price ductwork & installation only.” It states that bids are due by November 12. On November 5, Levasseur sent the Respondent his quote for performing the work. Levasseur testified that he received the purchase order from the Respondent dated November 21 officially notifying him that he had the contract to perform the work on its Contract #4343, but he was notified by the Respondent sometime prior to that date that he had the contract. He is certain of that because his employees performed some galvanizing work on November 21, and “...we have never in 15 years done any work on a job the same day it was given to us. It’s an impossibility.” Although he could not remember the exact date that he was informed that he had the job, it was sometime between November 5, when he faxed to the Respondent his price for performing the work, and, at the latest, November 20. He testified that the work that his employees began on November 21 was “burning” the ductwork for the contract, *i.e.*, cutting the pattern of the ductwork, which work Respondent does not perform. American’s employees finished burning this ductwork on November 24. American completed the work on Contract #4343 on about June 6, 2004. His sheet metal workers performed 2,544 field hours and 622 shop hours on the job. In Respondent’s “Bid Pot Report” dated April 26, 2004, covering Respondent’s jobs from January 1, 2003 to April 26, 2004, the number of ManDays projected for Contract #4250 was 181; the number of ManDays for Contract #4343 was 116.

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James testified that they subcontracted #4343 to American for two related reasons.

“There were two phases of the project. We were doing one phase of the project and we subcontracted the other phase of the project so that we knew it would get done on time.” The other reason was, “We wouldn’t be able to handle it. We wouldn’t have had enough people.” In addition, he identified certain documents regarding Contract #4343. The Respondent’s bid for the job sent to Rosewood is dated October 6. In addition, there is a one page document sent by Rosewood to the Respondent and is signed by Lytle and Rosewood’s project manager entitled “Authorization to Proceed.” It is dated December 2, it refers to Contract #4343 by its other name, the Tenant Work, and gives the project start date as October 27 and the completion date as March 23, 2004. He identified a Purchase Order that Rosewood sent to the Respondent, also dated December 2, stating: “Labor & Materials for HVAC WORK Re Plans and Specs,” with the contract price. There was also a Standard Form contract between Rosewood and the Respondent dated December 11, stating on the front page, “The Contractor has made a contract for construction dated 10/3/03.” There is no date on the signature page signed by Lytle and Rosewood’s project manager, but on the final page, a memo from Rosewood to the Respondent stating that all contractors working at the location had to provide current insurance certificates, was signed by Lytle on behalf of the Respondent on January 5, 2004.

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Kenneth Ekstrom is the owner of Ducts, Incorporated, a sheet metal contractor. He testified that in late 2003 he met an employee of the Respondent who asked him if he was interested in bidding on the Digital job and he said that he was, and that the Respondent should mail him the plans. About a day or two later he received the plans, but they sat on his desk for
 5 from three days to two weeks before he had an opportunity to review them. He spent one day reviewing the plans and on November 14 he sent his bid proposal to the Respondent for the job. He was not awarded the subcontract because his price was higher than American's bid price.

Since subcontracting Contract #4343 of the Digital job to American, the Respondent has
 10 subcontracted other work to American and other employers. They subcontracted two jobs to Donovan Sheet Metal, herein called Donovan. The first job was the installation of the duct work at BMW Peabody, which began in August 2004 with a total billing of about \$115,000. Donovan also received a contract from Respondent to perform the sheet metal work on Robertson on the River. This job began in about December 2004 and totaled about \$300,000. Because these two
 15 Donovan jobs began between nine and eighteen months after the unfair labor practices involved herein, they will not be discussed or considered further herein.

F. Other Jobs

20 Schiavone testified about other jobs that were performed by the Respondent during this period and also identified some business records of the Respondent in that regard. These documents, Respondent's "Bid Pot Report" from January 1, 2003 to April 26, 2004 and its Closed Contract Report for January 1, 2002 through May 25, 2005, while helpful in determining the jobs the Respondent performed during the relevant period and how many employees it was
 25 employing on these jobs, are far from exact. For example, the Closed Contract Report, while listing the start date or the contract date of the jobs, does not give the completion date. However, it does list a date for "Warr End." Based upon other evidence herein, I have concluded that, at times, the Warr End date is approximately one year after the completion of the job.¹¹ When that assumption appears untenable, I have so stated below. The Completed jobs listed on
 30 the Bid Pot Report are:

<u>Job No.</u>	<u>Contract or Start Date</u>	<u>Man Days Employed By Resp.</u>	<u>Approximate Completion Date</u>
4193	5/16/03	30	7/03
4284	9/20/03	20	1/04
35 4335	10/21/03	14	1/04
4382	1/26/04	10	4/04
4393	1/09/04	14	12
4098	4/22/03	43	13
4273	8/04/03	22	11/1/03
40 4289	8/15/03	10	14
4082	4/01/03	15	15

¹¹ For example, Levasseur testified that he completed the work on Contract #4343 of the Digital job on June 6, 2004. The Closed Contract Report for that job lists the Warr End date as 7/1/05.

¹² The Warranty End for this job is listed as 1/31/04. It is unclear whether that is a typographical error or is the correct date.

¹³ The Warranty End date for this job is listed as 10/31/03.

¹⁴ The Warranty End date for this job is listed as 9/25/03.

¹⁵ The Warranty End date for this job is listed as 10/8/03.

	4171	4/01/03	13	16
	4187	4/18/03	12	7/03
	4191	4/21/03	26	6/03
	4246	6/16/03	22	1/04
5	4317	9/16/03	0	
	4318	9/16/03	0	
	4323	9/17/03	0	
	4397	1/14/04	19 ¹⁷	4/04
	4172	3/28/03	14	18
10	4226	5/14/03	14	19

In addition, this report lists fifteen completed jobs, each with fewer than ten Mandays, with a contract or starting dates between February 20 and September 25 that cumulatively required ninety four Mandays. These Reports also list two jobs that Respondent began in 2003 that were continuing on April 26, 2004, the final date of the Bid Pot Report. The contract or starting date for these jobs were June 16 and August 20 and they together employed 225 Mandays.

G. Other Employees

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Summaries prepared by the Respondent state that no sheet metal workers began their employment with the Respondent between January and March 13, when Hess was hired. Six individuals filled out applications between January 2 and January 24, but none were hired. Boyce applied for employment on December 5, 2002 and was hired three or four months later as a lead foreman. One of Respondent's summaries states that he began working on March 3; another summary gives his starting date as April 28; he remained in the Respondent's employ until October 14. The next employees hired were Hess on March 13 and Dos Santos and Ferreira on April 29, as discussed more fully in the discussion above of Hess' employment with the Respondent. Respondent's summary further states that on March 24, May 23, June 1 and June 3 they received applications for employment from four individuals, but did not hire any of these individuals because they were not hiring at the time. After Dos Santos and Ferreira, the next production employees hired by the Respondent were three apprentice Co-op students; one began working on April 29 and two on June 23. They were, apparently, paid at the Co-op student rate of \$8.00 an hour, substantially less than the journeymen sheet metal workers, and all three left the Respondent's employ on September 1. James testified that, historically, the Respondent has employed Co-op students from two vocational schools in the area that have co-op programs. Alan Miller, service technician, and Keith Starosciak, service journeyman, applied for employment with the Respondent on April 20 and March 27 and were hired by the Respondent on June 2 and June 9 at \$26.00 and \$15.00 an hour respectively. On June 30, the Respondent hired three sheet metal assistants, Ferdinand Ramirez, Fernando Ramirez and Ricardo Arances at \$16 and \$18 an hour. No employment applications were filled out and they remained in the Respondent's employ until October 10. Schiavone testified:

What had happened was at the end of June we were backed up with a job called Target Store. We had a FedEx and Bill [Boyce] said why don't we bring in a couple of guys for a couple of months. They come here from Virginia. They're going to be out of here in

¹⁶ The Warranty End date for this job is listed as 10/6/03.

¹⁷ This was for all four jobs, numbers 4317, 4318, 4323 and 4397.

¹⁸ The Warranty End date for this job is listed as 10/1/03.

¹⁹ The Warranty End date for this job is listed as 9/11/03.

October. You don't have to give them any benefits at all and they're going to work relatively inexpensively. You have to give them what the law requires...but we didn't have to give them a health insurance policy. We didn't have to run them through the 401(k) program because they were going to be gone in a short period of time.

5 Daniel Rivera, a service apprentice, began working for the Respondent on July 21 at a wage rate of \$14 an hour. Keith Ordonez, who completed an employment application on August 19, began working for the Respondent on September 2 as a service technician at \$26.00 an hour. He remained in the Respondent's employ until January 5, 2004. Steve O'Mara applied for
10 a job with the Respondent on September 6 as a result of a newspaper advertisement, and began working on September 12 as a lead foreman at \$16.00 an hour. Between September 22 and November 3 Respondent hired three Co-op students and two general helpers. On December 9 the Respondent received an employment application from, and hired, Joseph Mainey, a service technician at a wage rate of \$20 an hour. He remained in the Respondent's
15 employ until May 14, 2004. Schiavone testified that at the end of October the Respondent employed seven or eight sheet metal workers and did not hire any others, at least, through the end of the year. He also testified to a number of reasons why the Respondent did not hire any employees during this period. As stated above, they received no employment applications from the WEEI advertisements between November 11 through November 25. In addition, he decided
20 that it was more efficient to subcontract some jobs rather than performing them with his own employees:

25 We examined all of our records carefully. That's why we have so many documents and looking at the profit and loss statements that we gathered over the years, we can see that we were gaining sales, but losing profit. So, what we decided to do was cut our work force. As a result of some contracting out of work we just decided that that this is not practical. We made more money now with fixed costs than we ever did when we estimated our work. The records will show in any number of cases in closed contract reports and in final adjustment post reports that typically Better Comfort Systems has
30 done better. Our gross profit has changed from a low of 29 percent up to a high of 42 percent or 39 percent because we reduced manpower.

35 Q Is there any advantage to Better Comfort to sub out sheet metal work, and I'm talking about installation, to contractors apart from what you've testified to so far?

A It increased sales, it increased coverage of our overhead without having to deal with the manpower liability issues...

40 III. Analysis

45 There are four allegations herein. It is initially alleged that the Respondent violated Section 8(a)(1) of the Act on November 21 when James told the Union applicants that the Respondent would not hire Union members. Additionally, it is alleged that on May 16 the Respondent failed and refused to hire, or consider for hire, Marenburg, Ross, Eva, Dalphonso, Saccardo, Brown and Campbell because of their Union membership when they applied for employment with the Respondent, in violation of Section 8(a)(3) of the Act, and that the Respondent similarly violated Section 8(a)(3) of the Act by failing and refusing to hire, or consider for hire, Marenburg, Creager, Fisher and Dever, when they applied to work for the Respondent on November 21. Finally, it is alleged that the Respondent subcontracted Contract
50 #4343 of the Digital job to American and subsequent sheet metal work in order to avoid hiring Union applicants, also in violation of Section 8(a)(3) of the Act.

The undenied credible testimony of Marenburg, Fisher, Dever and Creager is that, in one manner or another, James told them on November 21 and thereafter that he wouldn't hire them because of their Union affiliation. Whether it was: "I'm not hiring you people. You can fill out an application, but I'm not hiring you" [Marenburg]; "Oh, you're one of those [Union] guys, we're not hiring" [Fisher]; "I'm not looking for you guys" [Dever]; or, "I don't need any of you guys. I don't need to hire any Union guys" [Creager], the message was clear that he would not hire them because of their obvious Union affiliation. By this action, the Respondent has violated Section 8(a)(1) of the Act.

It is next alleged that by refusing to hire, or consider for hire, Marenburg, Ross, Eva, Dalphonso, Saccardo, Brown and Campbell on and after May 16, when they applied for employment with the Respondent, the Respondent violated Section 8(a)(1)(3) of the Act. There are three necessary elements that Counsel for the General Counsel must prove in order to establish an unlawful refusal to hire: (1) that the Respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) the applicants had experience or training relevant to the announced or generally known requirements of the position for hire; and (3) animus toward protected activity contributed to the Respondent's decision not to hire the applicants. If this burden is met by Counsel for the General Counsel, the burden shifts to the Respondent to show that it would not have hired the applicants even in the absence of their union affiliation or activity. *FES*, 331 NLRB 9, 12 (2000); *Dalton Roofing Service, Inc.*, 344 NLRB No. 108 (2005). *FES* only requires that one employee be hired. Which of the discriminatees are entitled to the available positions, and the backpay is determined at a subsequent compliance hearing.

The record herein establishes that Counsel for the General Counsel has satisfied his burden that the Respondent was hiring, or had plans to hire, sometime after May 16. Although two co-op students began working for the Respondent on June 23, I have not taken this into consideration herein because they were being paid \$8.00 an hour, a salary, presumably, that the salts would not have accepted. On June 2 and June 9 the Respondent hired service employees Miller and Starosciak at \$26.00 and \$15.00 an hour. On June 30, the Respondent employed Ramirez, Ramirez and Arances as sheet metal assistants. Although the Respondent attempts to differentiate these employees from its regular hiring pattern because they did not have to provide these employees with health insurance or 401(k) coverage because they would only remain in Respondent's employ for about three months, the fact remains that they were paid \$16 and \$18 an hour, a wage rate that the May 16 applicants might have been willing to accept, even without health care coverage, as their employment applications state that their desired salary range was negotiable or anything fair. Additionally, as Marenburg, Ross, Eva and Dalphonso were employed by the Union they, presumably had health care coverage through the Union and would not need Respondent's coverage. Rivera was hired on July 21 as an apprentice and was paid \$14 an hour, a wage that one of the applicants might have been willing to accept and Ordonez began working for the Respondent as a service technician on September 2 at a wage rate of \$26.00 an hour. The next employee hired was O'Mara, who learned about employment with the Respondent from a newspaper ad; he began working as a lead foreman on September 12 at \$16 an hour. The only other "unit" employee hired by the end of the year was Mainey, a service technician earning \$20 an hour, who began working for the Respondent on December 9. Additionally, in early October, the Respondent contacted WEEL to broadcast advertisements in order to recruit employees, and advertised in newspapers for sheet metal workers in August, September and October. The evidence therefore establishes that the Respondent was looking for qualified employees and was hiring between May 16 and December, and yet neither Schiavone nor James ever explained why they did not offer any one of these jobs to any of the May 16 applicants.

The next requirement of *FES* is that the applicants had the training or the experience relevant to the requirements of the job, and this has clearly been satisfied. Of the seven applicants, James testified that the only one who may have been lacking in sheet metal experience was Saccardo, yet the Respondent never offered employment to any of the applicants. Their employment applications stand in sharp contrast to that of Hess, who had less than five years of sheet metal experience, and yet he was hired immediately, and as a leadman. Even Saccardo's application, which listed three employers, the two most recent from 2001 to 2002 and 2002 to 2003, and one other sheet metal employer, but without dates of employment, states that he had about thirty years of skills or training that are related to the job. Although James questioned his lack of experience, these facts could have been discerned from an interview.

The final requirement is that animus toward the applicants' union affiliation contributed to the Respondent's decision not to hire the applicants. The sole direct evidence of animus prior to November 21 is James' statement to Hess on about May 6 that he didn't want to have anything to do with the Union. However, I believe that animus can be inferred herein as well. Marenburg, Ross and Brown, the only May 16 applicants who testified herein, each called James after May 16, Marenburg three times, and Ross and Brown, one each, yet James never called them back or responded to their calls in any other manner. The same is true of the November 21 applicants. On that occasion, after leaving their employment applications, Marenburg called James twice, Fisher, three times, Dever, once and Creager, three times. James never responded to any of these calls either and, as stated above, he also made it clear to the applicants that he was not going to hire Union members. Finally, neither Schiavone nor James ever explained why they did not offer employment to any of the applicants on or after May 16 and November 21. Although they testified that they were not hiring during this period, as stated above, a number of employees were hired after May 16 and, more significantly, the Respondent spent \$9,600 for radio ads on WEEI in November and employed newspaper ads as well as HVAC Agent to locate employees. Based upon this evidence, I discredit their testimony that they were not hiring and find that the May 16 applicants were not hired because of their obvious Union affiliation. Having found that Counsel for the General Counsel has satisfied his burdens under *FES*, *supra*, the burden then shifts to the Respondent to show that it would not have hired the seven applicants even in the absence of their Union affiliation. Based upon all the evidence described above, I find that the Respondent has not satisfied this burden. Their naked claim that they were not hiring is insufficient to overcome the substantial evidence produced by Counsel for the General Counsel. I therefore find that the Respondents failure and refusal to hire Marenburg, Ross, Eva, Dalphonso, Saccardo, Brown and Campbell violates Section 8(a)(1)(3) of the Act.

Under *FES*, *supra*, at p. 15, in order to establish a discriminatory refusal to consider allegation, Counsel for the General Counsel bears the initial burden of establishing: (1) that the Respondent excluded the applicants from the hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. If this has been established, the burden shifts to the Respondent to show that it would not have considered the applicants even in the absence of their Union affiliation. For the reasons stated above, I find that Counsel for the General Counsel has satisfied his initial burden and that Respondent has not satisfied its burden. Stated briefly, the seven applicants were highly qualified sheet metal workers whose telephone inquiries were never returned by the Respondent, while nonunion applicants were hired after May 16. Clearly, the Respondent never seriously considered hiring them. This failure to consider also violates Section 8(a)(1)(3) of the Act. *All Seasons Construction, Inc.*, 336 NLRB 994, 998 (2001).

It is next alleged that the Respondent violated Section 8(a)(3) by refusing to hire

Marenburg, Fisher, Dever and Creager when they applied for employment with the Respondent on November 21. Under the requirements of *FES, supra*, the initial requirement is that the Respondent was hiring, or had concrete plans to hire at the time of the alleged unlawful conduct. The clearest evidence of that is the fact that in October the Respondent contracted to pay WEEI \$9,600 for radio advertisements for recruitment purposes, and these ads were broadcast from November 11 through November 25. Additionally, Lytle told Karpinski that the Respondent needed people immediately, and paid a premium for the ads in order to be certain that they weren't preempted. Respondent defends that by the time these ads were broadcast, they had already subcontracted Contract #4343 to American, but as it was not within WEEI's two week cancellation policy, they could not cancel these radio advertisements. However, the sales order for these ads was not finalized until November 7. Although it is not clear precisely when American was given this subcontract by the Respondent (it was sometime between November 5 and November 20), when Respondent subcontracted Contract #4343 to American, it retained Contract #4250, which involved substantially more ManDays to perform, one hundred eighty one. Further, the Respondent hired Joseph Mainey as a service technician at \$20.00 an hour on December 9, the same day he completed his employment application. Additionally, there is the evidence of Marenburg's telephone calls to James on November 19 and 20. In addition to the fact that I found Marenburg to be a credible and believable witness, these conversations were not denied by James. In the first conversation, when Marenburg identified himself, James responded that he wasn't interested in hiring him and that he wasn't large enough to be a union employer. When Marenburg called James on the following day, in a covert manner, James appeared very interested and discussed a possible starting salary, as he did with Hess in March. These conversations establish both the first and third requirements of *FES, supra*. I therefore find that on about November 21, the Respondent was hiring or had concrete plans to hire.

The next requirement of *FES, supra*, is that the applicants had the training and experience relevant to the requirements of the job, and this requirement has clearly been satisfied. Dever listed four employers with whom he was employed as a sheet metal worker from 1997 to 2003, and Creager lists two employers where he was employed as a sheet metal worker from 1979 to 1999, when he became the Union business agent. Marenburg lists three employers where he was employed as a sheet metal worker for about eighteen years before becoming employed by the Union, and Fisher lists four employers where he was employed as a sheet metal employee and states in his employment application that he has performed sheet metal work for the prior ten years. However, in his application, of the four employers, there are no employment dates for two, and no year listed for one, but if James had any questions about his qualifications, he could have asked him about them, rather than just not considering the application, as he did.

The final requirement is that animus toward their Union affiliation contributed to the Respondent's decision not to hire them. This has also clearly been established. As stated above, the credible uncontradicted testimony establishes that James told the November 21 applicants that he would not hire them because of their Union affiliation. In addition, as stated above regarding the May 16 applicants, the Respondent never called them, or returned their phone calls, and never explained why it did not hire any of these applicants.

As Counsel for the General Counsel has satisfied his burden, the burden shifts to the Respondent to establish that it would not have hired these four applicants even in the absence of their Union affiliation. In August, September and October the Respondent placed newspaper advertisements seeking sheet metal workers and beginning on November 11, the Respondent had radio advertisements that it contracted for in October, for the purpose of recruiting employees. In addition, it had recently obtained the two contracts for the Digital job, the biggest

job that it had ever obtained. On November 21, four well qualified sheet metal workers applied to work for the Respondent, yet the Respondent never returned any of their subsequent telephone calls and none was ever offered employment even though Respondent hired a service technician on December 9. Respondent defends that it didn't need these applicants because they subcontracted Contract #4343 to American before November 21. This presents a difficult credibility issue. The evidence establishes that the first day that American's employees worked on this contract was November 21, the same day that the applicants applied to work for the Respondent. Whereas this would normally be viewed suspiciously, in this case I found Levasseur to be a totally credible and believable witness, and find credible his testimony that he must have obtained the subcontract from Respondent prior to November 21 because it was impossible for his employees to begin working on the same day that he received the subcontract. I make this finding based upon Levasseur's testimony rather than Schiavone or James' testimony because I found their testimony less than credible. I found both of them somewhat disingenuous in some aspects of their testimony. For example, Schiavone²⁰ testified that, because of the nature of the industry, if applicants have not obtained employment in the industry within three or four weeks after applying for employment with the Respondent, "...you're not worth working with us so we won't hire you." However, Respondent's employment summary lists four employees who were hired between November 12, 2001 and June 28, 2004 whose employment applications were submitted from six weeks to four months before they were hired. In James' situation, he testified that because of the discrepancy on dates of employment in Marenburg's May 16 employment application and his November 21 employment application, he would not hire an applicant such as Marenburg with conflicting employment dates on his employment applicant. I found this testimony disingenuous because Marenburg had to complete two employment applications only because the Respondent unlawfully refused to hire him based upon the first application. Further, if James was so concerned about the conflicts, he could have asked Marenburg to explain the conflicting dates.

Based upon all the evidence herein, principally the WEEI recruitment ads, and the fact that neither Schiavone nor James ever testified credibly as to why they failed to offer employment to Marenburg, Dever, Fisher and Creager, I find that the Respondent has failed to satisfy its burden that it would not have hired them even absent their Union affiliation. This failure to hire them, as well as the failure to consider them for hire, therefore violates Section 8(a)(3) of the Act. *FES, supra*.

The final allegation is that on about November 4, the Respondent began subcontracting its sheet metal work to other employers in order to avoid hiring Union applicants, in violation of Section 8(a)(3) of the Act. The weak link of this allegation is the timing. Even though American's work on Contract #4343 did not begin until November 21, the same day that the four applicants appeared at the Respondent's facility to apply for work, I have credited Levasseur's testimony that he was awarded this contract sometime between November 5 and November 20. Further, the evidence fails to establish any Union activity between about the end of May, when the applicants applied for employment and called the Respondent's facility to learn if the

²⁰ Near the end of the hearing, in his cross examination of Schiavone, Counsel for the General Counsel asked him if during the investigation of the first unfair labor practice charge, he told the Board agent, referring to the Union applicants, that he didn't hire "sneaks." Counsel for the Respondent directed Schiavone not to answer the question, and he complied with counsel's instruction even though I warned him that I would take his refusal to answer as an affirmative answer to the question. Upon further reflection, because there was no testimony that Schiavone said this to the Board agent, I have taken no cognizance of the question or Schiavone's refusal to answer it.

Respondent had acted on their applications, and November 19, 20 and 21, when Marenburg called James and Marenburg, Fisher, Dever and Creager appeared at the Respondent's facility to apply for employment. Counsel for the General Counsel, in his brief, states that he is not relying on the Union's reappearance between November 19 and 21 to establish this violation.

5 Rather, he alleges that the violation is established because, "...Respondent would never have considered subcontracting if in July/August it had seriously explored hiring the Union-affiliated applicants and satisfied its staffing needs in that way."

10 The Board employs a *Wright Line*²¹ approach to these cases as well as the usual Section 8(a)(3) cases. *St. Vincent Medical Center*, 338 NLRB 888 (2003). Therefore, it must initially be determined whether Counsel for the General Counsel has presented evidence that antiunion animus was a motivating factor in the Respondent's decision to subcontract the work on Contract #4343 and later subcontracts. If Counsel for the General Counsel has satisfied this initial burden, the final question is whether Respondent has satisfied its burden that it would have subcontracted the work even in the absence of the applicants' Union membership and activities. I find that Counsel for the General Counsel has sustained his initial burden under *Wright Line*. Since May 16, the Respondent has had employment applications from seven highly qualified individuals in its file, and the evidence clearly establishes that the Respondent never seriously considered hiring any of them. James never notified them of the status of their applications and never returned their telephone calls. He also told Hess in May that he didn't want to have anything to do with the Union and told the November 21 applicants that he wouldn't hire them because of their Union membership. Further, between August 29 and November, the Respondent spent about \$11,000 for newspaper and radio advertising to recruit HVAC and sheet metal employees, rather than hiring any of the seven May 16 applicants. This establishes that the Counsel for the General Counsel has satisfied his initial burden that the employees' Union membership was a motivating factor in the Respondent's decision to subcontract some of the Digital work to American rather than hiring any of the May 16 applicants. The final issue is whether the Respondent satisfied its burden that it would have subcontracted the work even in the absence of the applicants' Union membership. I find that they have not. The Respondent had never previously subcontracted this type of work and provided no explanation for why they had to subcontract this job, except to state that they did not have the required manpower to conclude the job within the allotted time. The obvious response to this defense is that it had seven and, after November 21, ten highly qualified applicants whom they could have employed to perform this work. If they had not violated the Act by refusing to hire, or consider for hire, these applicants, they would not have had to subcontract the work to American. I therefore find that this subcontract was given to avoid hiring Union employees, and violates Section 8(a)(3) of the Act.

40 Conclusions of Law

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

45 2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. On about November 21, 2003 the Respondent, by James M. Schiavone, told applicants that it would not hire Union members, in violation of Section 8(a)(1) of the Act.

50 ²¹ 251 NLRB 1083, 1089 (1980).

4. On about May 16, 2003 the Respondent failed and refused to hire, or consider for hire, the following seven employment applicants, because of their Union membership, in violation of Section 8(a)(1)(3) of the Act:

5 Edward Marenburg
John Ross
Robert Eva
Tony Dalphonso
Tom Saccardo
10 Monica Brown
Kevin Campbell

5. On about November 21, 2003 the Respondent failed and refused to hire, or consider for hire, the following four employment applicants, because of their Union membership, in violation of Section 8(a)(1)(3) of the Act:

15 Edward Marenburg
Fred Creager
Todd Fisher
20 Joe Dever

6. Since on about mid-November 2003, the Respondent began subcontracting sheet metal work to other employers in order to avoid hiring applicants who were members of the Union, in violation of Section 8(a)(1)(3) of the Act.

25

The Remedy

Having found that the Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action set forth below to effectuate the policies of the Act.

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Having found that the Respondent unlawfully discriminated against job applicants Edward Marenburg, John Ross, Robert Eva, Tony Dalphonso, Tom Saccardo, Monica Brown, Kevin Campbell, Fred Creager, Todd Fisher and Joe Dever, I recommend that the Respondent be ordered to offer them employment and make them whole for any loss that they suffered by reason of the Respondent's failure to hire them, or consider them for hire, as set forth in *FES*, *supra* and, more particularly, *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed per *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²²

40

ORDER

The Respondent, Better Comfort Systems, Inc., its officers, agents, successors and

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²² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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assigns, shall:

1. Cease and desist from:

(a) Telling employment applicants that it would not hire them because of their Union affiliation or membership.

(b) Failing and refusing to hire, or consider for hire, applicants for employment because of their Union activities, membership or affiliation.

(c) Subcontracting sheet metal work in order to avoid hiring applicants who are affiliated with, or are members of, the Union.

(d) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer instatement to Edward Marenburg, John Ross, Robert Eva, Tony Dalphonso, Tom Saccardo, Monica Brown, Kevin Campbell, Fred Creager, Todd Fisher and Joe Dever to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, in the manner set forth in *FES, supra*, and make them whole for any loss of earnings and other benefits caused by reason of the discrimination against them, as set forth above in the Remedy section of this Decision.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facility in Malden, Massachusetts copies of the attached notice marked "Appendix."²³ Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 21, 2003.

²³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

5 (e) Within 14 days from the date of the Board's Order, remove from its files any
reference to the unlawful refusal to hire or to consider for hire Edward Marenburg, John
Ross, Robert Eva, Tony Dalphonso, Tom Saccardo, Monica Brown, Kevin Campbell,
Fred Creager, Todd Fisher and Joe Dever, and within 3 days thereafter notify the
10 employees in writing that this has been done and that the actions will not be used
against them in any way.

Dated, Washington, D.C.

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Joel P. Biblowitz
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT tell job applicants that they will not be considered for employment because of their Union membership or affiliation, **WE WILL NOT** refuse to hire, or consider for hire, employment applicants because of their Union membership or affiliation, and **WE WILL NOT** subcontract our work in order to avoid hiring applicants who are affiliated with, or are members of the Union.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees, or employment applicants, in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days, offer Edward Marenburg, John Ross, Robert Eva, Tony Dalphonso, Tom Saccardo, Monica Brown, Kevin Campbell, Fred Creager, Todd Fisher and Joe Dever employment to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and **WE WILL** make them whole for any loss of pay and other benefits that may have resulted from our refusal to hire them, or consider them for hire.

BETTER COMFORT SYSTEMS, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

10 Causeway Street, Boston Federal Building, 6th Floor, Room 601

Boston, Massachusetts 02222-1072

Hours of Operation: 8:30 a.m. to 5 p.m.

617-565-6700.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S

COMPLIANCE OFFICER, 617-565-6701.

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